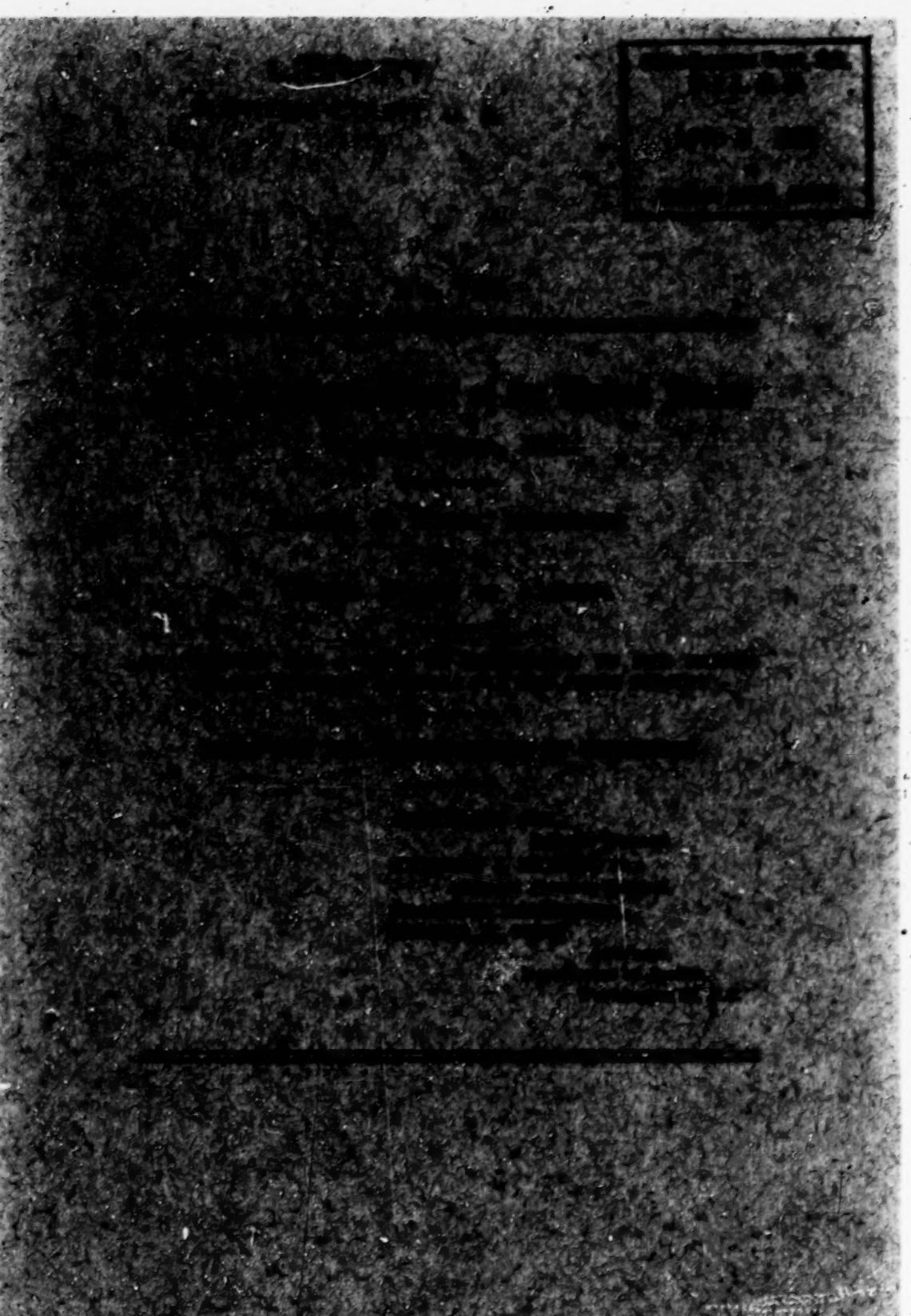

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 785

HAROLD S. KAHM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (R. 457-75;[1] Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on February 9, 1962 (R. 476). The petition for a writ of certiorari was filed on March 8, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] The record on file with the Clerk of this Court consists of a two-volume transcript, which is herein designated "R." Also on file with the Clerk are the original trial exhibits which were introduced by the government and the petitioner.

QUESTIONS PRESENTED

1. Whether the trial court correctly submitted to the jury the question of the obscenity of material petitioner was charged with having sent through the mails in violation of 18 U.S.C. 1461.

2. Whether the evidence of petitioner's knowledge and purpose in sending the allegedly obscene matter through the mails was sufficient to support his conviction.

3. Whether petitioner could be convicted of the offense of sending obscene matter through the mails where there had been no prior administrative determination by postal officials that such matter was obscene.

4. Whether 18 U.S.C. 1461, under which petitioner was convicted, is constitutional.

5. Whether this Court's decision in *Roth* v. *United States*, 354 U.S. 476, defining the standard of obscenity under 18 U.S.C. 1461, requires reexamination.

STATUTE INVOLVED

Section 1461 of Title 18, U.S.C., provides in pertinent part as follows:

> Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and—
>
> * * * * *
>
> Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters,

articles, or things may be obtained or made. * * *

* * * * * *

Is declared to be nonmailable matter * * *. Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section to be nonmailable, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, or knowingly takes any such thing from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter.

* * * * * *

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted on each of nine counts of a ten-count indictment,[2] charging that he had knowingly distributed through the mails obscene "pamphlets, writings and publications" (counts 8, 9) and advertisements giving information as to where and how obscene mate-

[2] Count 1 was dismissed on the government's motion before the commencement of the trial (R. 434). Before all of the evidence was in on counts 8 and 9, the government sought to abandon them "solely for the purpose of limiting the trial * * *" (R. 178). However, after some discussion with the court, this motion was withdrawn (R. 179-82).

rial might be obtained (counts 2–7, 10), in violation of 18 U.S.C. 1461 (R. 2–7, 435). Petitioner was sentenced to 5 years' imprisonment on each count, the sentences to run concurrently; however, the sentences were suspended, and petitioner was placed on probation for their duration (R. 440–41). The court of appeals unanimously affirmed the conviction (Pet. App. A).

1. The evidence disclosed that petitioner conducted a mail-order business at Orlando, Florida, through which he solicited and filled orders, at prices ranging from $1.00 to $4.95 each, for pamphlets variously entitled "Sex for Single Men," "The Art of Seduction," "Sex Tortures," "Stag Limericks," "Sack's Book Reviews" and "Whizbangs" (R. 43–46, 59–63, 75–77). Unsolicited advertising circulars were mailed primarily to persons whose names appeared on mailing lists purchased by petitioner (R. 377–79, 389–91); among the addressees of these unsolicited advertisements were Arthur Richard Self, aged 15, of Cordell, Oklahoma (R. 96–100), and Donald Dittier, aged 18, of St. Louis, Missouri (R. 30–34). In response to test mailings by a postal inspector, certain of the pamphlets advertised in these circulars were sent through the mails, providing the basis for counts 8 and 9 (R. 5–6, 103–07, 111–13, 185–203).

2. The mailings on which counts 8 and 9 were based contained, among other things, the pamphlet, "Sack's Book Reviews," and the mailings on which counts 2–7 and 10 were based contained a brochure in which that pamphlet was advertised. The pamphlet was composed simply of selected excerpts from published

books, such as *Peyton Place* by Grace Metalious; there was no continuity or relationship among the excerpts except that each was a detailed description of individuals engaging in sexual activities, in some instances heterosexual and in others homosexual (R. 113–31). The advertising material described the pamphlet as containing "the sizzling hot pages concealed among the 80,000 words of many seemingly innocent novels. The authors haven't missed a trick: rape, seduction, homosexuality, Lesbianism, perversions, gang orgies, wrestling, kicking, biting, whipping, caressing, beating, moaning—all the writhing, bare bedroom facts of life in heartpounding detail are here" (R. 59).

The count 8 and 9 mailings also contained the pamphlet, "Sex Tortures," and the count 2–7 mailings also contained advertisements for this pamphlet. The pamphlet described in detail various methods of inflicting physical pain upon the genital organs of the victims (R. 196–203). According to the advertisements, it contained "sex tortures of the most horrible kind * * * inflicted upon the helpless, bound naked bodies of male and female victims. All described in picture-clear detail" (R. 59). The mailings on which counts 2 through 10 were based also contained various others of petitioner's publications or advertisements for them.

3. A psychiatrist appearing on behalf of the government[1] testified that "the full effect" of "Sack's Book Reviews" would be to arouse the prurient interest of

[1] This witness appeared as part of the government's rebuttal case.

the normal reader (R. 403; see also R. 402); he said that the way in which these suggestive excerpts were massed made them particularly stimulating (R. 414) and that one of them, at least, would have a greater tendency to arouse the average reader than, for example, a picture of a nude woman displaying her pubic area (R. 407). He testified that the impact of "Sex Tortures" on the average reader would be one of "horrid fascination" but with "a sexual component" resulting from the fact that "torturing and suffering of pain" are "necessary for the complete gratification of a sex desire in many people" (R. 403–04). He further testified that even the advertisements were sexually stimulating in and of themselves (R. 401).

A sociologist called by the defense, while testifying that narrative material is generally less stimulating sexually than pictures (R. 297), conceded that it was "highly possible" that a person could find "Sack's Book Reviews" sexually stimulating (R. 272), that it might well arouse "lustful thoughts" in the average person (R. 273), and that some portion of it "might prove sexually stimulating to a great degree" (R. 283; see also R. 270–71, 298). He also testified that this publication would be more likely to arouse the prurient interest of a young man than of an older man (R. 277; see also R. 284).

The defense was permitted to introduce, or to have the expert and lay witnesses compare with petitioner's publications, a variety of material generally available to the public, including so-called "girlie" magazines, nudist magazines, paper-back books (such as *Peyton*

Place, *Lady Chatterley's Lover*, and a number of books dealing with sex tortures), advertisements for motion pictures, and some admittedly "hard core" pornography (R. 255-59, 313-14, 322-26, 332-35, 387-88). The defense psychiatrist testified that the magazines, books and advertisements were more stimulating sexually than petitioner's publications (R. 255, 256, 258, 259); the government's psychiatrist testified that such material was no more stimulating than petitioner's publications (R. 412-13).

4. Petitioner testified in his own defense that he first went to Orlando, Florida, in 1957 (R. 223), and, after having engaged in several unprofitable business ventures (R. 233-36), decided to enter the mail-order business in printed material concerning sexual matters (R. 236-46). He stated that financial considerations played an important part in his decision to enter this business (R. 368-69), noting that sex "is one of the best selling items in our society * * *" (R. 238; see also R. 345, 372). He testified that at first he made little money in this venture (R. 246), but then he obtained a mailing list of "names and addresses of people who had purchased somewhat similar material, Sex Books, Party Records, and all sorts of things" (R. 336). He testified that his income "shot up enormously when I started using these" (R. 390; see also R. 246).[*] Petitioner indicated that he published "Sack's Book Reviews" primarily because he thought it would be profitable (R. 311); although he admitted

[*] The government's evidence showed that petitioner had received some $1,700 in proceeds from this mail-order operation in the last eight-to-ten days preceding his arrest (R. 175-76).

that the excerpts of which the pamphlet was composed were not "book reviews" in the ordinary sense, his justification for so designating them was that their purpose was to inform the readers that each of the books covered "does deal with sex" (R. 372).

Petitioner testified that, except for the limericks, "humor" and "book reviews," he himself had written most of the material he published (R. 247–48). He conceded that he had printed and mailed the pamphlets and advertisements that were the subject of the indictment (R. 245, 247, 315, 308–09, 370–71), but testified that he had conducted his business openly (R. 315, 335) and that he did not believe the material he was mailing was obscene (R. 335, 340). He said that he did not intentionally send material to minors (R. 388) and that it was "a shock and a surprise" for him to learn that material he was mailing did go to minors (R. 390).

5. The trial court instructed the jury on the standard it was to apply in determining obscenity, in pertinent part, as follows (R. 426–27):

> Gentlemen of the jury, you are * * * instructed that you are not to consider the patched or separate portions of the material in question in determining obscenity. But you are to judge the material as a whole in its entire context.
>
> * * * The test of obscenity is whether to the average person and applying present day standards throughout the nation, the dominant theme of the material as a whole, in question, appeals to the prurient interest. By the term prurient

> is meant itching, longing, uneasy with lewd or morbid desire or longing. * * *

The jury was instructed that it could consider the defense evidence introduced "to show that certain material and books are openly sold in the Orlando community" but that they as jurors were to determine "what the contemporary community standards are and, apply those standards in arriving at your decision" (R. 425).

ARGUMENT

It is difficult to determine from the score or so "questions" and subquestions the petition presents (Pet. 2–5) and from the undifferentiated argument thereon (Pet. 10–13) precisely what issues petitioner would have this Court review. The contentions on which he appears to place the most reliance are (1) that the issue of whether the material in question was obscene should not have been submitted to the jury, (2) that there was no evidence as to petitioner's state of mind sufficient to convict him of these charges, (3) that there should have been an administrative determination by postal officials as to the obscene character of the material in question before petitioner was criminally charged with having mailed it, (4) that 18 U.S.C. 1461, under which petitioner was convicted, is unconstitutional, and (5) that the case of *Roth* v. *United States*, 354 U.S. 476, was wrongly decided by this Court. There is no merit to any of these contentions nor to any of the host of other arguments advanced in the petition.

1. Petitioner contends that the issue of obscenity should not have gone to the jury for two reasons: first, because the government "offered no proof of obscenity whatsoever" (Pet. 8; see also Pet. 2, 7, 10), and, second, because such an issue can be submitted to the jury only when the material is obscene "as a matter of law" (Pet. 11; see also Pet. 3, 12). Since the sentences upon all the counts on which petitioner was convicted run concurrently, it is appropriate to consider this contention (as the court of appeals considered it, Pet. App. 5) in relation to the "pamphlet" counts (8 and 9) alone, without consideration of the "advertising" counts. See, *e.g.*, *Lawn* v. *United States*, 355 U.S. 339, 359; *Hirabayashi* v. *United States*, 320 U.S. 81, 85.[5]

In its case-in-chief, the government introduced the pamphlets on which counts 8 and 9 were based; indeed, two of them were read aloud to the jury (R. 113–31, 196–203). In addition, the government introduced petitioner's own descriptions, in his advertising circulars, of these pamphlets. As the court below found (Pet. App. 10–11), no sophisticated analysis or expert guidance was necessary for the jury to be able to judge the obscenity of this material as a whole in relation to community standards. It had

[5] Petitioner's unsupported assertion (Pet. 4) that such analysis is improper is, of course, without merit.

[6] For the same reason, it is unnecessary to consider the alleged "conflict" (Pet. 3, 10) between *United States* v. *Hornick*, 229 F. 2d 120 (C.A. 3) and a district court case, *Voss* v. *Christenberry*, 179 F. Supp. 411 (S.D.N.Y.), which are concerned only with the portion of 18 U.S.C. 1461 punishing the mailing of information as to where obscenity may be obtained.

an ample basis in the pamphlets themselves to find them obscene. Moreover, when petitioners contested this evidence with the testimony of a sociologist, the government in rebuttal introduced expert psychiatric testimony to shed additional light on the obscene character of the material. In short, the government amply met its burden under the statute in relation to the obscenity issue.

There is no basis whatever for petitioner's novel contention that the issue of the obscenity of challenged material may be submitted to the jury only when the judge finds it obscene "as a matter of law." As the court below observed (Pet. App. 17–18), it is clear from this Court's decision in *Roth* v. *United States*, *supra*, 354 U.S. at 486, 489–90, that the obscenity issue in a prosecution under 18 U.S.C. 1461 is a question of fact for determination by the jury (assuming, of course, that in any particular case reasonable men may differ as to whether the material is obscene[1]). See also, *e.g.*, *Rosen* v. *United States*, 161 U.S. 29, 42–43; *Parmelee* v. *United States*, 113 F. 2d 729, 731 (C.A.D.C.); *United States* v. *Dennett*, 39 F. 2d 564, 568 (C.A. 2).

2. Petitioner contends that his conviction was defective because there was insufficient evidence of *scienter* or *mens rea* on his part (Pet. 2, 3, 7, 10, 12). Petitioner conceded that he was aware of the contents of the pamphlets he mailed; indeed, he admitted that he wrote or compiled them himself. Hence, no problem of *scienter* is raised under *Smith* v. *Cali-*

[1] Petitioner concedes that the *Roth* case so held (Pet. 3).

fornia, 361 U.S. 147. Petitioner bases his contention on his testimony that he did not believe this material was obscene. As this Court has held, that is no defense even if true, for "[e]very one who uses the mails of the United States for carrying papers or publications must take notice of what, in this enlightened age * * * must be deemed obscene, lewd and lascivious." *Rosen* v. *United States*, *supra*, 161 U.S. at 42; see also *Roth* v. *United States*, *supra*, 354 U.S. at 491. Moreover, the character of the material petitioner disseminated, and the evidence that he was engaged in the business of publishing non-educational sex literature primarily for pecuniary gain and that he obtained and employed special mailing lists of persons who had purchased such matter, provided an ample basis for the jury to disbelieve petitioner's protestation that he did not know this material was obscene.

3. Similarly lacking in merit is petitioner's argument that his conviction is invalid because there had not been a "prior determination of obscenity" by means of the "postal administrative machinery" (Pet. 5, 9; see also Pet. 3–4, 11). Apparently petitioner contends that, before he can be criminally charged with having sent obscene matter through the mail, the Post Office Department must have conducted a mailability proceeding in which it found the matter obscene. As the court below concluded (Pet. App. 17), there is no basis, either in the statute or in the case law, for such a contention. The interdiction of 18 U.S.C. 1461 and 39 U.S.C. Supp. III, 4001 against the carrying of obscene matter in the mails, and the postal

procedures thereunder for determining mailability, are entirely separate and distinct from the criminal offense of mailing obscenity. Congress plainly did not intend, nor has any court ever suggested, that the administrative procedure is a prerequisite to the criminal procedure (or vice versa); for example, no administrative determination preceded the criminal conviction for mailing obscenity that was affirmed by this Court in *Roth* v. *United States*, *supra*.

4. Petitioner's challenge (Pet. 5, 11, 12) to the constitutionality of 18 U.S.C. 1461 is not entitled to serious consideration. As petitioner concedes (Pet. 10, 11), the constitutional validity of the criminal provisions of that statute were sustained by this Court in *Roth* v. *United States*, *supra*, 354 U.S. at 492. Petitioner advances no argument against the statute that either was not disposed of in the *Roth* case (*e.g.*, that the statute is unduly vague; Pet. 5, see 354 U.S. at 491–92) or is not plainly frivolous (*e.g.*, that the statute "attempts to regulate matters other than obscene matters" and that "it is in the nature of an ex post facto law or bill of attainder," Pet. 5).

5. The trial court properly instructed the jury on the correct standard for determining obscenity, as laid down by this Court in *Roth* v. *United States*, *supra*, 354 U.S. at 487 (see pp. 8–9, *supra*). However, petitioner contends that the *Roth* case was incorrectly decided. The bases for this contention are varied—that the Court "employed conflicting definitions of obscenity" (Pet. 2–3), that the Court erred in holding "obscenity to be a matter of fact" (Pet. 3) (see p. 11,

supra), that the Court's decision "amounts to judicial legislation" (Pet. 5), that it "left some very serious questions unanswered and created some new ones" (Pet. 10), and that it "gave * * * impetus to censorship activities" (Pet. 12). None of these claims is supported in any way, nor is there the slightest merit to any of them. Petitioner has suggested no valid reason for the Court to reexamine the *Roth* decision.

6. The remaining contentions in the petition are far too lacking in merit to warrant extensive treatment. The claims of error in relation to the burden of proof and the presumption of innocence (Pet. 2, 10–11) are fully refuted by the record (see, *e.g.*, the trial court's charge, R. 423–24). The alleged conflicts in decision that are suggested (Pet. 3, 10), but are never spelled out, are either irrelevant (see n. 6, *supra*) or nonexistent. The claim that there was some defect in the jury's consideration of "community standards" has no warrant in the record; petitioner was given wide scope in introducing evidence on that subject (see pp. 6–7, *supra*), and the trial court correctly instructed the jury in that regard (see p. 9, *supra*). Finally, the suggestion that the court of appeals was biased against petitioner (Pet. 4; see also Pet. 10) is utterly gratuitous and without any foundation.

CONCLUSION

Petitioner has raised no issue warranting review by this Court. Accordingly, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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APRIL 1962.

U. S. GOVERNMENT PRINTING OFFICE 1962